No. 8092

In the United States
CIRCUIT COURT OF APPEALS

For the Ninth Circuit

In the Matter of

WILLIAM DILLER,

Bankrupt.

William Diller,

Appellant,

vs.

Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation,

Appellees.

BRIEF FOR APPELLEE MICHAEL SHOEMAKER

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I.

FACTS

The statement of facts contained in appellant's opening brief is condensed to the point of omitting certain particulars which appellee Michael Shoemaker deems material. These facts are as follows:

(a) In addition to the contention that subdivision "s" of

the National Bankruptcy Act as amended August 28, 1935, was unconstitutional, the petition of this appellee upon which the order now appealed from was made prayed for the dismissal of the proceeding on each of the following grounds:

1. The District Court had no jurisdiction to entertain appellant Diller's petition of June 24, 1935;
2. The proceedings were prosecuted in bad faith and solely for the purpose of hindering, delaying and defrauding this appellee;
3. The relation of debtor and creditor did not exist between appellant Diller and this appellee for the reason that appellant did not assume or agree to pay the note secured by the deed of trust held by this appellee.

(T. p. 17.)

(b) The restraint placed upon this appellee by the order of the District Court of September 5, 1936, denying to this appellee the exercise of his rights and remedies under his deed of trust continued uninterruptedly until that court made its order of December 13, 1935, dismissing said proceedings. (Tr. pp. 19-21 incl.)

(c) At the hearing pursuant to which the order appealed from was made, evidence was offered and received upon all of the grounds for dismissal set forth in this appellee's petition. (Tr. p. 20.)

(d) It appeared and was admitted at such hearing that the property covered by this appellee's deed of trust was appraised in the **original** subdivision "s" proceeding at $46,550.00. (Tr. pp. 17 and 20.)

(e) While the District Court in its **opinion** filed in this

matter gave as its reason for making the order which it did make its belief that the said amended subdivision "s" was unconstitutional, such order was an unqualified and unconditional dismissal of the proceedings prosecuted before it by the appellant Diller. (Tr. pp. 33-34.)

(f) As will appear from the records of this court, and more particularly from its minutes of February 3, 1936, appellant Diller sought an opportunity to supersede the judgment appealed from pending the appeal and was by this Court accorded an opportunity to do so upon posting a supersedeas bond fixed by this Court on said 3rd day of February, 1936, at which time inquiry was addressed from the bench of this Court to counsel for appellant Diller as to whether or not said appellant was able to post and intended to post such bond inasmuch as this Court was not disposed to make an order even temporarily superseding such judgment unless appellant was able to post and intended to post such bond, and thereupon in open court appellant represented his ability and intent to post such bond and on the basis of such representation this Court temporarily superseded the judgment, but during such period so allowed for the filing of such bond, appellant failed to post the same and used said period solely for the purpose of initiating an entirely new proceeding under section 75 of the National Bankruptcy Act.

(g) Appellant Diller having voluntarily admitted in his opening brief (page 7, para. no. 20) that this appellee has caused a foreclosure sale to be held under the deed of trust held by him resulting in a deficiency in connection with which this appellee has commenced an action to recover such deficiency in the state court, he may not object to and

has indeed by necessary implication invited the placing before this court in similar manner of the further fact that in such state court action appellant herein has filed a verified answer prepared by his present counsel in this case in which he solemnly swears that he never assumed or agreed to pay the obligations set forth in the note and deed of trust held by this appellee or any of them.

(h) Although the question of the constitutionality of said amended subdivision "s" was attacked in the pleading of this appellee in the District Court and the decision of said court was placed upon the ground of the unconstitutionality of said statute, appellant Diller did not present to the said District Court, or in his assignment of errors upon appeal, or at any time prior to filing his opening brief herein, the objection that the raising and/or consideration of such constitutional question was premature. (Tr. pp. 6-22, incl. and pp. 38-41 incl.)

II.

THE ISSUES.

From the foregoing statement of additional facts, it is clear that three issues are presented for determination upon this appeal:

(A) **Should the judgment of dismissal entered herein be affirmed irrespective of the constitutional question?**

(B) **Should it be determined herein that the constitutional question was prematurely raised and adjudicated?**

(C) **Was the constitutional question correctly adjudicated by the District Court?**

III.

ARGUMENT

(A) THE JUDGMENT OF DISMISSAL ENTERED

HEREIN SHOULD BE AFFIRMED IRRESPECTIVE OF THE CONSTITUTIONAL QUESTION.

The Supreme Court of the United States has established the rule that even though it may appear that the court below may have erred in dismissing a proceeding, yet if, on appeal from such order, the appellate court finds any other ground upon which such dismissal should have been made, it must affirm the judgment.

Ridings v. Johnson, 128 U. S. 212.

There are not less than three grounds upon the basis of which the dismissal entered herein should be affirmed in addition to the ground expressly relied upon by the District Court.

1. The Dismissal Should Have Been Made Because No Validly Initiated Proceeding Was Pending Before the Court.

Upon the admitted facts contained in paragraphs 7, 8, 9 and 10 of appellant's statement of the facts (opening brief pp. 4 and 5), appellant Diller's original section 75 proceeding was dismissed and the proceeding dismissed herein was **not** a re-instatement of **that** proceeding under the terms of the amended subdivision "s", but was a purported **new** proceeding commenced several months prior to the enactment of the new subdivision "s" wherein Diller attempted to secure a re-adjudication of the identical matters already submitted and adjudicated in the original section 75 proceeding.

The District Court had no authority to entertain such new proceeding which was the **only** proceeding pending before it on and after June 24, 1936.

In Re Archibald, 14 Fed. Supp. 437.

2. The Dismissal Should Have Been Made Because the Proceeding Could Not Be Prosecuted in Good Faith.

It stands admitted that delinquent principal on this appellee's note amounted to $48,000.00. Delinquent interest amounted to $6,000.00 more. On top of that, large sums of taxes were unpaid and a lien against the property. Taxes for an ensuing year were a lien and about to become delinquent, in part at least. Bearing these facts in mind, the outstanding fact bearing upon the good faith of appellant is the further fact that in the original subdivision "s" proceeding the property was appraised at but $46,550.00. Appellant himself is at great pains to impress upon this Court the fact that such appraisement was not one confined to the **market value** of the property, but was one addressed to its **intrinsic** value. (Opening brief, p. 17.)

Where, then, can appellant stand but precisely in the position of a "dog-in-the-manger"? He cannot even claim for himself that extremely questionable "good faith" of the property owner claiming (at the expense of his creditor) the right to a delay in order to speculate upon the recovery of the real estate market. He is pilloried squarely in the position of a debtor holding property so burdened with debt that no reasonably prudent or intelligent man would seek to retain it for its own sake and who therefore can only be pictured as holding onto it to further harrass, annoy and delay a creditor already bound to take a loss on the transaction. The courts have repeatedly held that they will not permit themselves to be made use of as the lethal weapon in such a "hold-up" but will dismiss the proceeding on the ground of bad faith.

In Re Borgelt, 10 Fed. Supp. 113 (Affirmed November 23, 1935, in 79 Fed. (2) 929);

In Re Hilliker, 9 Fed. Supp. 948;

In Re Cosgrave, 10 Fed. Supp. 672;

In Re Loop, C. C. H. (New Matters) par. 4001;

In Re Byrd, C. C. H. (New Matters) par. 4064;

In Re Slaughter, 13 Fed. Supp. 893.

The element of bad faith is extremely persuasive in this case in view of the events subsequent to the granting by this Court of a temporary **supersedeas** solely for the purpose of permitting appellant to post a permanent **supersedeas** bond. After using this period for the sole purpose of harrassing his creditors by filing an entirely new section 75 proceeding, appellant failed to post the bond, and, there being thereupon no **supersedeas,** this appellee caused the property to be sold by the trustee under the terms of his deed of trust. Under the decision of this court rendered on June 1, 1936, in **Heffron v. Western Loan & Building Co.,** 84 Fed. (2) 301, title passed to the purchaser under such sale; and if any reversal of the judgment herein can be made effective such result can only be accomplished by a setting aside of such sale. Conceding that such action might be taken in an appropriate case, the bad faith and total want of equity in appellant disclosed by the record herein militate conclusively against the equity of any such procedure in the instant case. There is therefore clear ground for affirmance of the judgment of dismissal on the ground of bad faith.

3. The Dismissal Should Have Been Made Because No Debtor-Creditor Relation Exists Between Appellant and This Appellee.

Appellant Diller being unquestionably on record under

oath as asserting that he did not assume or agree to pay the note or deed of trust held by this appellee, no such debtor creditor relationship ever existed between them as would permit of the application of the terms of section 75 of the National Bankruptcy Act in the administration of the property subject to such note and deed of trust.

In Re Hanley, 9 Fed. Supp. 463, point 2.

(B) IT SHOULD NOT BE DETERMINED HEREIN THAT THE CONSTITUTIONAL QUESTION WAS PREMATURELY RAISED AND ADJUDICATED IN THE LOWER COURT.

1. Appellant Failed To Present In a Timely Manner His Contention That the Constitutional Point Was Considered Prematurely.

Appellant did not prior to filing his opening brief on this appeal present the claim that the constitutional question was prematurely considered by the lower court. On the contrary, he joined in arguing and submitting the constitutional question to the lower court on its merits.

Generally speaking, objections not made in the lower court and not assigned as error cannot be considered in the appellate court.

U. S. Supreme Ct. Rep. Dig., Title Appeal & Error, sec. 1104, **et seq.;**

De John v. Alaska etc. Coal Co., 41 Fed. (2) 612;

Wood v. A. Wilbert's Sons etc. Co., 226 U. S. 384;

More specifically, it is held that where the decision of the lower court is challenged in error and the attention of the lower court was not called to the alleged error, such error will not be considered by the appellate court.

Montana R. Co. v. Warren, 137 U. S. 348.

More specifically still, where a party joins in presenting a question to the lower court on the merits, he will not be heard to say for the first time on appeal that the court should not have determined the question.

U. S. Supreme Ct. Rep. Dig., Title Appeal & Error, sec. 1118 and sec. 1121;

Walker v. Beal, 9 Wall. 743.

2. If the Propriety of the Action of the Lower Court In Considering the Constitutional Question Be Analyzed On Its Merits, It Appears That Such Consideration Was Wholly Proper.

Appellant's suggestion that the first appeal in the Pamp case **(United States National Bank of Omaha v. Pamp,** 77 Fed. (2) 9) has a bearing upon the merits of the question now under consideration is quite misleading. The appeal in that case involved an order made in an "a" to "r" proceeding under section 75 and the contention having been made that subdivision "s" was unconstitutional, the court quite properly held that inasmuch as the case might never reach subdivision "s" and as subdivision "s" was entirely severable from the "a" to "r" proceedings, it would be time enough to consider the constitutionality of subdivision "s" if and when the case progressed into proceedings under that subdivision. In the present case, proceedings had admittedly progressed into subdivision "s" on September 21, 1935.

It was only thereafter that this appellee raised the constitutional question as to that section for the first time. Under unimpeachable authority, it was this appellee's duty to raise the question at the first possible opportunity on pain of waiver of the right to do so at all.

12 Corpus Juris, p. 785, para. 217.

Had this appellee participated in the proceedings, as he could not well avoid doing under the provisions of the subdivision, without raising the constitutional question, he would be held to have waived it.

12 Corpus Juris, p. 773; para. 199;

Detroit etc. R. Co. v. Osborn, 189 U. S. 383.

Appellant's assumption that this appellee was not presently injuriously affected by the application of the statute is entirely without support in the record. Admittedly, this appellee was denied by the District Court's order of September 5, 1935, the right to enjoy his rights and remedies under his deed of trust. Admittedly, also, from and after September 21, 1936, such order was operative, and operative solely, under and by virtue of the terms of the statute under attack. It is obvious from the mere recital of this situation that this appellee was suffering immediate injury by application of the statute and that nothing short of an order of dismissal or an order granting leave to foreclose could relieve him from the continuance of such injury. Such injury is all that appellee was required to show to qualify to raise the constitutional question.

12 Corpus Juris, p. 763, Note 68;

Savage v. Jones, 225 U. S. 501.

There is no merit in appellant's contention that appellee had not actually suffered injury under the specifically obnoxious portions of the statute because the court had not yet reached the point of actually making the three year moratorium adjudication. Not only was appellee subject to the actual restraint of the court pending the actual making of the moratorium adjudication, but he was directly and imme-

diately threatened with the making of such adjudication. It is entirely sufficient to qualify a person to raise the constitutional question with respect to a statute that he is **threatened** with injury in contra-distinction to an immediate suffering of injury.

Utah Power & Light Co. v. Pfost, 286 U. S. 165 at 186, headnote 10;

Crampton v. Zabriskie, 101 U. S. 601;

Washington Water Power Co. v. City of Coeur D'Alene, 9 Fed Supp. 263.

Even if it could be urged that the actual restraint to which appellee was immediately subject under the order of September 5th, was not a restraint under the obnoxious terms of the statute and even if it could be conceded in the face of the obviously inconsistent fact that appellee was not threatened with direct and immediate injury under the obnoxious terms of the statute, the fact that he was restrained at all under the toils of the statute qualified him to show that the statute as a whole was void on account of obnoxious provisions therein even if he was not personally threatened with immediate injury from such specific provisions.

State v. Louisiana Coca-Cola Bottling Co., Ltd., 124 S. 769, (La.);

State v. Cumberland Club, 188 S. W. 583 (Tenn.), headnote 5;

State v. Bengsch, 70 S. W. 710 (Mo.), headnote 9;

12 Corpus Juris, p. 764, note 72.

We have heretofore considered the question presented on the authority and reasoning that would be applicable to it as a question raised **de novo.** The question is, however, settled by the so-called Radford case (**Louisville Joint Stock**

Land Bank v. Radford, 295 U. S. 555.) In the Circuit Court of Appeals decision in that case (74 Fed. (2) 576), the court considered favorably contentions along the line of those made by appellant herein. (Points 8 and 9 of the Circuit Court of Appeals' opinion.) The Supreme Court, however, had no hesitation in considering the constitutional question on its merits. And it is particularly interesting to note that while the general literature of the Radford case shows that various and sundry proceedings were had in the lower courts under the provisions of subdivision "s" of the statute, the precise matter in which **certiorari** was granted by the Supreme Court, and in which the decision of the Supreme Court was rendered, involved a presentation of the constitutional question simply upon the bankrupt's petition and the creditor's answer raising the question at the first opportunity for pleading.

(C) THE CONSTITUTIONAL QUESTION WAS CORRECTLY ADJUDICATED BY THE DISTRICT COURT.

1. Re-Statement of the Points For Argument.

The argument of appellant addressed to the question of the constitutionality of the amended Frazier-Lemke Act falls into two main parts.

The first part of such argument advances the contention that the 1935 statute so far avoids the taking of private property rights admittedly taken by the 1934 statute that the 1935 statute may not be condemned upon the authority of the Radford case **(Louisville Joint Stock Land Bank v. Radford,** 295 U. S. 555, 79 L. Ed. 1593) which condemned the 1934 statute. This argument will be answered in subdivision "2" of this division of our brief.

The second part of such argument advances the contention that even if the 1935 statute does involve a taking of private property rights, such taking may be sustained by application of the theories upon the basis of which the Supreme Court of the United States has sustained a similar taking by moratory legislation enacted by the several states. **(Home Building & Loan Ass'n. v. Blaisdell,** 290 U. S. 398.) This argument will be answered in subdivision "3" of this division of our brief.

A third consideration affecting the constitutionality of the 1935 statute has not been considered by appellant in his opening brief. We refer to the fact that this statute lacks that universality of geographical application and that uniformity in its application to a given class of persons essential to the validity of national legislation. This consideration will be presented in subdivision "4" of this division of our brief.

Before passing, however, to take up the three points of argument just outlined, we desire to take brief cognizance of the attempt of appellant to win sympathetic consideration for the amended Frazier-Lemke Act, by stressing the presumption of constitutionality arising in connection with all legislation and by emphasizing a picture of the Congress consciously and conscientiously struggling with the application of constitutional principles in the matter of the drafting of the statute.

The Constitution is of course the supreme law. Any act of the Congress which is violative of this supreme law and the rights and interests protected thereby, is unconstitutional.

While the general rule may be that there is a presumption that the Congress acts in conformity with the constitution,

such presumption is readily rebuttable and must always be considered in the light of another well settled rule to the effect that constitutional provisions for the protection of persons and property "are to be liberally construed," and further that it is the duty of the courts "to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon."

Byars vs. United States, 273 U. S. 28, 32.

United States vs. Lefkowitz, 285 U. S. 452, 464.

We respectfully submit that the presumption relied upon by appellant in this connection has no application to the facts before the court on this appeal.

2. The Amended Frazier-Lemke Act Does Deprive This Appellee of Property Rights In Violation of the Principles Announced In the Radford Case.

At the time at which appellant Diller initiated these proceedings, appellee owned a note secured by a power-of-sale deed of trust covering California real estate claimed as an asset by appellant. The entire principal sum was delinquent, substantial sums on account of interest were delinquent, and the property securing the note was in jeopardy by reason of the non-payment of substantial amounts of taxes. Prior to the submission of the motion to dismiss on the ground (among others) of the unconstitutionality of the amended Frazier-Lemke Act, more than three months had elapsed following recording by this appellee of a notice of breach and election to sell pursuant to the provisions of section 2924 of the Civil Code of the State of California.

Appellant does not deny, and indeed admits, that under the laws of the State of California appellee was at that moment entitled to rights analogous to each of the five rights

listed by the court in the Radford case. That is to say, appellee then possessed, subject only the impairments attempted in the amended Frazier-Lemke Act:

1. The right to retain the lien until payment of the indebtedness secured thereby;
2. The right to realize upon the security by the manner of sale authorized by the California law;
3. The right to determine when such sale shall be held subject only to such interference as may result from an exercise by a court of competent jurisdiction of recognized equity powers;
4. The right to require the holding of such sale in the form of fair competitive sale at which the amount of the secured indebtedness could be bid for the property; and
5. The right to control meanwhile the property during the period of default, subject only to such interference as may result from an exercise by a court of competent jurisdiction of recognized equity powers and to have the rents and profits collected by a receiver and applied to the satisfaction of the debt.

Two propositions of cardinal importance with respect to these five rights were definitely settled by the Radford case —if, indeed, it can be said that there was ever any serious doubt as to either of them—namely:

(1) That each and every one of these five rights constitutes a property right protected by the Fifth Amendment to the Constitution; and

(2) That the power of the Congress to enact bankruptcy legislation is limited by such Fifth Amendment.

Appellant's opening brief has the effect of confusing the reader as to these two cardinal points by setting forth long, technical and detailed comparative analyses of the 1934 and 1935 acts as a basis for the contention that the Radford case, while undoubtedly establishing the law with respect to the 1934 act, has no application to the 1935 act. But the fact remains that, irrespective of the details of the particular statute to which they may be applied, these two cardinal points are definitely, explicity and finally established by the Radford case.

It can only remain, therefore, to determine whether or not the amended Frazier-Lemke Act takes any one of these five property rights. Were any doubt, ambiguity or uncertainty to be encountered in making such determination, it might be material (in the sense of being persuasive) to make detailed technical comparisons of 1934 act and the 1935 act for the purpose of showing the close analogies between them as a basis for using as an authority herein the decision in the Radford case holding that the 1934 act did take similar rights.

However, there is not the slightest doubt or ambiguity concerning the effect of the 1935 act as a taking of at least four of these five rights and the only possible uncertainty is a legal one as to the definition accorded by the Supreme Court to the term "lien" as used in the description of the property right heading the list of rights above set forth. We shall, accordingly, briefly demonstrate the taking in each instance by direct reference to the 1935 act and resort to the opinion in the Radford case for a definition of the term "lien" in connection with the appellee's right to "retain" his lien.

Taking up the rights stated in inverse order, there is not the slightest doubt whatsoever but that the fifth right listed, that is the right to control the property during the period of default, is distinctly, directly and explicitly taken by the amended Frazier-Lemke Act. This, as a matter of fact, is conceded by appellant on the bottom of page 25 of his opening brief. The concession is coupled with the contention that the taking is to be justified on the theories under which moratory legislation enacted by the several states has been sustained. Inasmuch as this latter contention is dealt with exclusively in the next subdivision of our brief, the concession made by appellant would permit us close the present branch of our argument at this point but for the further suggestion that the Radford decision and the principles of constitutional law which it expounds are to be construed as permitting the Congress to do a **little** taking, or to take **one** property right, but as forbidding the piling up in the same statute **several** takings.

This amazing contention which appellant makes in italics on page 43 of his opening brief is entirely unsupported by authority. The case of **W. B. Worthen Co. v. Kavanaugh,** 295 U. S. 56, cited in this connection was not concerned with the problem which is now engaging our attention. It was not concerned with determining whether there was **any** "taking" of property. It was necessarily conceded on all sides in that case that there was a taking. The problem there was one of application of the **police powers of states** more particularly discussed and defined in the next subdivision of this brief under which the test to be applied by the court was not whether or not there was **any** taking, since admittedly **some** taking by the states is justified under their re-

served police power, but whether there was such a **substantial** taking as to be oppressive and therefore improper even in the exercise by the states of such police power.

In the present case, and in the Radford case, the question presents an application of the Fifth Amendment to an assumption by the Congress to exercise a delegated power, a situation which, as we shall presently show, is entirely different. As was stated in **In re Davis,** 13 Fed. Supp. 221, the question is not one of "the degree or percentage of constitutionality of a statute, enacted with special reference to that which the Supreme Court has declared to be the law" but whether there is any taking of a substantial right inherent in the security created under the state law defining the lien rights claimed by the creditor. Each and every one of the rights herein listed was recognized by the Supreme Court in the Radford case as a substantial right of the character just designated. There is no basis whatsoever any where in the opinion, whether the same be taken as a whole or broken down into its parts, which would justify the conclusion that one of them was more important than another or that one or any other number less than all of them might be taken without violation of the constitution or that such violation resulted only from a group violation of several or all of them.

But other substantial rights are taken by the 1935 statute, among them the right to determine when sale shall be held subject only to such interference as may result from an exercise by a court of competent jurisdiction of recognized equity powers. The taking of this right, also, is expressly conceded by appellant at the bottom of page 24 of his opening brief and again he attempts to justify the taking upon

grounds to be considered in the next subdivision of our brief. It must suffice to point out here that the taking is another taking of substantial rights inherent in the security created by the California law. Under the California law, appellee was entitled to determine upon an immediate exercise of his power of sale. At the sale so to be held, he was entitled to a sale of the property on terms entitling the purchaser to immediate possession. Both of these rights are taken from appellee by the statute which makes a gift of a three year leasehold estate to the debtor during which time no sale may be held and no purchaser let into possession.

Again, the statute takes the right of appellee to realize upon the security by the form of sale authorized by the California law. Appellant does not concede this taking as he was compelled to concede the two takings last referred to. The reason for appellant's position in this behalf is to be found in a mis-conception and too literal application of the language of the Radford decision. It is quite true that the language of that decision, applying as it did to the precise and particular case before the court in that specific instance, held that the form of sale to which the Louisville Joint Stock Land Bank was entitled in that case was a "public judicial sale". It is also true that in framing the 1935 Frazier-Lemke Act the Congress departed from the provisions of the 1934 statute so that ultimately, and subject to the other takings herein referred to, the lienholder might be entitled to a public judicial sale. But the cardinal point which both the congressional draftsmen and appellant overlook is that the actual decision in the Radford case is that the rights of the creditor in that case were to be measured by the laws of the state wherein the real property was located, that is to say in that

case by the laws of the State of Kentucky, and the laws of the State of Kentucky gave to the creditor a right to a "public judicial sale." Applying the same fundamental reasoning to the present case, the rights of appellees are to be measured by the laws of the State of California and the laws of the State of California do not limit trust deed holders to "public judicial sales" but permit sales under the power of sale contained in such deeds thereby vesting in the trust deed holder a right to a sale which in its form and incidents differs substantially from a public judicial sale. That the statute attempts to take this right from appellees is unarguably clear.

Finally, this appellee respectfully submits that the right to retain his lien until the indebtedness is paid is taken by the 1935 Frazier-Lemke Act. Appellant denies such taking on the ground that as a matter of form the lien is continued of record against the property during the period of the three year estate created for the benefit of appellant and presented to him as a gift by the terms of the statute. The cardinal point in the decision of the Supreme Court in the Radford case is that in determining whether or not the lien is retained the court will look through the form to the substance and if the substance is so impaired as to leave the form a mere hollow shell, it will be held that the creditor is deprived of his lien. It is true that in the Radford case the court took account, among other things, of the fact that the 1934 act purported to authorize an extinguishment of the creditor's lien on the land and the attachment of such lien to a fund. And appellant argues that because the 1935 act avoids this procedure, it necessarily and **ipsi facto** follows that the lien is "retained" under the 1935 act in distinction to and in con-

trast with the situation under the 1934 act struck down in the Radford case. This matter of form, however, was by no means vital. As appellant points out on page 45 of his opening brief, the Supreme Court itself has not hesitated to approve statutes authorizing sales of real property free from mortgage and trust deed liens and transferring the liens of the holders of such instruments to the proceeds of the sale under fair and duly safeguarded procedure which insures the retention of the lien **in substance.** It was the impairment of the lien **in substance** rather than any incidental impairment **in form** that lay at the root and basis of the condemnation of the statute in the Radford case. In approaching a consideration of such impairment, the court looked both forward and backward from the unescapable conclusion that the real (as distinguished from the obvious) purpose of the act was not to effect a bankruptcy administration but to create delays and prolong possession of the mortgagor to promote his interest at the expense of the mortgagee. (Page 597 of the opinion.) In further evaluating the extent to which the delay so given affected the substance of the lien, the court took into account the danger of accumulation of unpaid taxes and interest, the danger of waste and deterioration in value, the loss of ability to develope and realize a fair rental and the loss of opportunity to sell the property during the period of the delay.

It requires no extended or technical detailed comparative analyses of the 1934 and 1935 statutes to reach the conclusion that both acts are conceived and drafted with a single aim, intent, purpose and effect, namely to create an equitable estate in land for a given period of years at the expense of the mortgagee or trust deed beneficiary and to make a pres-

ent of such estate to the mortgagor or trustor and that under the one act as well as under the other the period of the life of such estate is beset with identical dangers of accumulation of unpaid taxes and interest, identical dangers of waste and deterioration in value, indentical loss of opportunity to manage the property and develope and realize adequate rentals, and identical loss of opportunity to sell. That being so, the 1935 act just as surely takes from the appellee the right to retain his lien as did the 1934 act.

Large numbers of decisions have reached the same conclusion upon similar reasoning. Naturally, we consider these cases more soundly reasoned than the cases collected on page 29 and following of appellant's opening brief. We recognize, however, that it is the exclusive prerogative of the Court to determine which line of cases rests upon the sounder foundation of law and logic. We feel that it would be an impertinence to attempt to labor the point by an insistent analysis of the two lines of decisions addressed to the constitutional questions here presented. We, therefore, submit without further comment the line of authorities determining that the amended Frazier-Lemke Act is unconstitutional. It comprises the following cases:

United States National Bank v. Pamp, 83 Fed. (2) 493;

Lafayette Life Insurance Co. v. Lowmon, 79 Fed. (2) 887;

In Re Diggle, C. C. H. (New Matters) sec. 3951;

In Re Mullikin, C. C. H. (New Matters) sec 4000;

In Wogstad, 14 Fed. Supp. 72;

In Re Schoenleber, 13 Fed Supp. 375;

In Re Tschoepe, 13 Fed. Supp. 371;

In Re Davis, 13 Fed. Supp. 221;
In Re Lindsay, 12 Fed. Supp. 625;
In Re Sherman, 12 Fed. Supp. 297;
In Re Young, 12 Fed. Supp. 30.

3. **The Amended Frazier-Lemke Act May Not Be Sustained By Application of the Theories Which Justify Enactment of Moratory Legislation By the Several States.**

Assuming that, as we have established in the next preceding subdivision of this brief, the amended Frazier-Lemke Act invades property rights, takes property without due process of law and impairs the obligation of contract, appellant presents to this court the following argument:

1. Moratory legislation enacted by the State of Minnesota which does these identical things was upheld by the Supreme Court of the United States in the Blaidsdell case (**Home Building & Loan Ass'n. v. Blaisdell,** 290 U. S. 398, 78 L. Ed. 413);
2. The Congress is limited by the Fifth Amendment in exactly the same manner and degree and to no greater extent than the several states are limited by the Fourteenth Amendment;
3. Therefore the Blaisdell case furnishes a precise yardstick for measuring the constitutionality of the amended Frazier-Lemke Act.

Were we to concede the second proposition in this speciously plausible framework of reasoning, the conclusion would logically follow. The proposition, however, is so manifestly at variance with the classical distinction between the exercise by the Congress of delegated powers and the exercise by the several states of reserved powers, that we would not concede the necessity of a formal argument in re-

ply but for the fact that appellant presents in support of his proposition the opinion of the District Court for the Western District of Kentucky in the case of **In re Reichert,** 13 Fed. Supp. 1. (Opening Brief, pages 33 to 39 incl., and particularly the bottom of page 38.)

It is needless, we think, to undertake to review in detail the decisions of the United States Supreme Court cited in the Reichert case in support of the proposition relied upon by appellant. Examination of these decisions discloses that they are without exception based upon regulations prescribed by the Congress in the exercise of the great substantive powers granted to it by the Constitution, such, for example, as the power to regulate commerce between the states, or foreign commerce, or the leasing and use of real estate in the District of Columbia during emergencies covered by the world war, or some similar substantive power. All that is meant by these decisions cited in the Reichert case is that the Congress has plenary authority to exercise the powers expressly granted by the Constitution.

But, specifically, the police power, which is precisely and exactly the power under which the Minnesota Moratorium considered in the Blaisdell case was sustained, is a power not granted to the Congress but reserved to the states.

12 Corpus Juris, 910, par. 417.

The police powers reserved by the states embody what Chief Justice Marshall aptly described in **Gibbons vs. Ogden,** 9 Wheat. 1, 203, as "that immense mass of legislation which embraces everything within the territory of a state not surrendered to the federal government."

The United States Supreme Court in **United States vs. Butler,** .....: U. S. .....; 56 S. Ct. 312, 323, 324; 80

L. Ed. Ad. Op. 287, 297, and **United States vs. Constantine,** 296 U. S. .....; 56 S. Ct. 223; 80 L. Ed. Ad. Op. 195, 199, has recently had occasion to lay particular emphasis on the fact that the states have not surrendered their police powers to the federal government, and that such powers are reserved to the states and protected by the Tenth Amendment.

There are many other decisions to this same effect. Out of these many other decisions, however, we desire to call the attention of the court to two in support of this proposition, to-wit:

Hammer vs. Dagenhart, 247 U. S. 251, 273, 274 and 275, and

United States vs. Dewitt, 9 Wall. 41, 44 and 45.

It follows, therefore, that appellant has quite manifestly failed to sustain the proposition that the rules expressed in the Blaisdell case with respect to the exercise by the states of the reserved police power may be applied to the exercise by the Congress of quite different powers.

The distinction may be most readily grasped by quoting at some length the brief discussion on the subject of police power as limited by the constitution contained in section 106 of the article on Constitutional Law contained in volume 5 of California Jurisprudence, page 695:

> "An exercise of the police power, legitimate in other respects, cannot be condemned as invalid on the ground that it is an unlawful or unauthorized invasion of the right of property, or upon the ground that it is a taking of property without due process of law, or that it deprives persons of the equal protection of the laws contrary to the fourteenth amendment of the constitution

of the United States, or that it impairs the obligation of contracts. Neither the fourteenth amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develope its resources, and add to its wealth and prosperity. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. x x x x x x However, such regulations must be reasonable, devoid of oppression, and must not amount to an improper or arbitrary infringement upon the constitutional rights of individuals."

This, then was the yardstick applied in the Blaisdell case: Was the Minnesota statute one which a legislative body might within the limits of reasonableness determine to be appropriate to increase the industries of the state, develope its resources and add to its wealth and prosperity? Was it devoid of oppression? Did it avoid arbitrary infringement of individual rights? The Supreme Court held that it did all of these things, and, therefore, irrespective of the fact of whether or not it invaded the rights of property, or took property without due process of law or impaired the obligation of contracts, it was, of course, sustained.

But the very essence of the decision in the Radford case was that a **different yardstick** is applicable to an act of Congress. And in that behalf, the court expressly and explicitly stated in language so plain that all who run may read that

the Congress **may not** enact a statute which invades rights of property or a statute which takes property without due process of law.

Undiscouraged, however, by this plain, unambiguous and explicit language, appellant insists that the power to enact such statutes may be found to exist as a power incidental and ancillary to the delegated power of the Congress to enact bankruptcy legislation. If this theory had not been expressly and unmistakably refuted in the Radford case, the refutation thereof would follow as a necessary corollary from the application of almost unnumbered decisions of the Supreme Court.

In **United States vs. Butler,** .....U. S. ....., (56 S. Ct. 312, 80 L. Ed. Ad. Op. 287), it is said at page 296, that:

> "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted."

In this Butler case, an act by which the Congress assumed to exercise its taxing power was held to be a void act for the reason that it invaded the rights reserved to the states in that the real purpose of the act was to regulate and control crop production in the several states whereas no such power had ever been conferred on the federal government.

A similar fate befell the child labor tax act in **Bailey vs. Drexel Furniture Co.,** 259 U. S. 20, this statute being one by which the Congress undertook to regulate and control the matter of child labor under the guise of exercising its taxing power.

In **Linder vs. United States,** 268 U. S. 5, 17, it was held that the Congress could not, under the guise of exercising its taxing power, regulate and control the practice of a profession.

The principle recognized and applied in these cases has also been recognized and applied in many other cases including **Frick vs. Pennsylvania,** 268 U. S. 473 at 495, and **Nichols vs. Coolidge,** 274 U. S. 531, and 541, wherein the courts have held that the Congress cannot by indirection accomplish that which it is forbidden to do directly.

The taxing power of the Congress is of far greater importance than the power to enact laws on the subject of bankruptcies. This latter power at the most is a matter of expediency and convenience. Since the adoption of the Constitution as the fundamental law of our land, national bankruptcy laws have been in effect for little more than one-third of the entire period. On the other hand, the taxing power, and the exercise thereof, is absolutely essential to the existence of the nation as a sovereign power.

When it is considered, therefore, that the acts of the Congress above noted were held to be void acts on the ground that they were encroachments on the powers reserved to the states, nothwithstanding the fact that Congress in the enactment of these acts had assumed to act under its broad power of taxation, it inevitably follows that so much the less does the Congress have power to encroach upon the sovereign police powers reserved to the states by undertaking to regulate and control the internal affairs of the state under the pretext of exercising the power to enact laws on the subject of bankruptcies.

Included in the police powers reserved to the states are those great fundamental powers by which each state is authorized to determine the terms and conditions, nature, extent and validity of mortgage liens on lands therein and the rights of mortgagees thereunder, and also the power to determine the terms and conditions, nature, extent and val-

idity of the remedies provided by its laws for foreclosing such mortgage liens and directing the sale of the lands in satisfaction thereof.

In **M'Cormick vs. Sullivant,** 10 Wheat. 192, it is said (p. 202) that:

> "The title and disposition of real property is subject to the laws of the country where it is situated which can alone prescribe the mode by which the title to it can pass from one person to another."

In **United States vs. Fox,** 94 U. S. 315, it is said (p. 320) that:

> "The title and modes of disposition of real property within the state . . . . are not matters placed under the control of federal authority."

In **DeVaughn vs. Hutchinson,** 165 U. S. 566, it is said (p. 570) that:

> "To the law of the state in which the land is situated, we must look for the rules which govern its descent, alienation and transfer."

In the Lowmon case, 79 Fed. (2nd) 887 (CCA 7), it is said at page 891 that "where property rights are regulated by the state law, the Congress has no right under the bankruptcy power to alter those rights," and further that while federal courts may be authorized to take jurisdiction of and administer the bankrupt's property, such courts "must administer that property as they find it, and they have no power to create new rights in it for the benefit of either debtor or creditor." **In re Lindsay,** 12 Fed. Supp. 625, 630, states the rule in a similar manner.

This accords with the decision of the United States Supreme Court in the Radford case where the Kentucky law, which was part of the contract between the parties,

was adjudged to be the controlling factor.

It is certain that the Congress by the 1935 Frazier-Lemke Act has most emphatically not undertaken as its actual end and aim to provide for the liquidation of the estate of appellant or for the distribution of such estate to his creditors. On the contrary, the sole and only purpose of such statute is to take from appellee a part of his interest in mortgaged property and to give the same to appellant for purposes deemed by the Congress to be productive of the common good, in other words to regulate (for the purpose of promoting what was conceived to be the general good) the rights of appellant and appellees in the mortgaged properties, regardless of the fact that those rights have been and are established by the laws of the State of California.

Had the State of California undertaken to do that very thing, its power to do so might be sustained under the principles of the Blaisdell case as an exercise of the police power even though the exercise of such power involved the invasion of property rights and the taking of property without due process of law or the impairing of the obligation of the contract. But when the Congress attempts to exercise that power, under the guise of a delegated power to control the liquidation and administration of bankrupts estates, such attempt plainly meets the insurmountable bar of the Fifth and Tenth Amendments.

4. The Amended Frazier-Lemke Act Lacks the Universality and Uniformity of Application Required of National Legislation.

In order to be valid, an act of the Congress of the United States must be universal insofar as it reaches or touches the geography of the nation. Likewise, it must be uniform in its application to a given class.

Midwest Mutual Insurance Co. v. DeHoet, 22 N. W. 548 (Ia.), (Headnote 5);

Head Money Cases, 112 U. S. 580.

The amended Frazier-Lemke Act fails to meet these standards of universality and uniformity. Section 6 of the act undertakes to vest in each district court the power and duty to determine for itself when the emergency said by the Congress to have been created by the late economic depression is over "in a locality." If and when any court finds that such highly desired day has arrived, it may shorten the proceedings provided for in the act and proceed to liquidate the estate.

It thus appears that the whole intention of the act as it now exists is to leave the delay in each of the several districts to the energy with which the debtors in that locality may wail and the perseverance with which creditors in that locality may press their claims and to the interaction of such activities upon the conscience of the local district judge. The result may well be, and obviously was intended by the Congress to be, that the act might be in force in Southern California and not in force in Northern California, applicable in California and not applicable at all in Arizona, alive in Washington and dead in Oregon. There is no legal way under which, consistently with the principles announced in the above cited cases, the Congress can accomplish this highly bizarre result.

We anticipate, however, that appellant will advance the suggestion that the objectionable feature of the act just referred to may be cut away without affecting the act as a whole. It is, on the contrary, the contention of appellee that the invalidity of this portion of the act taints the entire statute. The Court must, of course, determine, if possible,

from the statute itself whether the Congress intended it to stand or fall as a whole; whether it was intended that the valid portions of the statute should be severable; or whether the statute was intended as a fully integrated unit.

Dorchy v. Kansas, 264 U. S. 286;

Butts v. The Merchants & M. Transportation Company, 230 U. S. 126.

The significant and, we believe, controlling consideration in this connection in the present instance is that the Congress has expressly and explicitly characterized **the entire statute** as an **emergency measure** by including therein the words:

> "This act is hereby declared to be an emergency measure."

If, then the entire act is an emergency measure, and if the Congress has been unable to limit the application and administration of the act to the emergency, can it be said that the Congress intended the act to be administered irrespective of the existence of the emergency and possibly for years after the entire termination thereof? The answer to this question appears to us to be an inescapable and unqualified negative. That being so, the entire act is so connected with and dependent upon the emergency, that the failure of the provisions limiting it to the emergency must necessarily involve the failure of the entire act.

IV.

CONCLUSION.

The judgment of dismissal herein should be affirmed as to appellee Shoemaker because:

(1) Irrespective of the constitutional question, this appellee is entitled to a judgment of dismissal because:

(a) The proceeding purportedly pending was not authorized by the statute;

(b) The proceeding could not be prosecuted in good faith; and

(c) No debtor creditor relation ever existed between appellant and this appellee;

(2) The statute purporting to support the proceedings is so violative of the Fifth and Tenth Amendments to the federal constitution as to be wholly void, it appearing in that behalf:

(a) That the constitutional question was raised and considered, a procedure not now open to attack because:

(i) Appellant joined in submitting the constitutional question to the lower court for decision without questioning the timeliness of such consideration; and

(ii) On the merits of the question as to the timeliness of such consideration, the court was fully justified in deciding the point;

(b) That the constitutional question was correctly decided because:

(i) The statute effects an actual taking of property rights of this appellee of a character condemned by the Supreme Court in the Radford case; and

(ii) Such taking cannot be justified under the principles established by the Blaisdell case with reference to exercise of police power by the states; and

(iii) The statute lacks the universality and uniform-

ity of application required for national legislation.

Respectfully submitted,

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